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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

**Plaintiffs' Opposition to Defendant's Motion to Dismiss Plaintiffs'
Unjust Enrichment Claim in the Second Amended Complaint
Case No: C05-03649.JW**

PRELIMINARY STATEMENT

Plaintiffs submit this memorandum in opposition to defendant Google Inc.’s (“Google”) motion to dismiss the unjust enrichment claim in the Second Amended Complaint (“SAC”).

Plaintiffs amended their pleading in full compliance with this Court’s Order Granting Defendant’s Motion to Dismiss Plaintiffs’ Unjust Enrichment Claim with Leave to Amend, dated April 12, 2006 (the “Order”). Accordingly, Plaintiffs’ unjust enrichment claim in the SAC no longer includes allegations that an express contract governs the parties’ rights and it alleges, in the alternative, that if an express contract between the parties governing this dispute is found to exist, then such contract is unenforceable as a result of defendant’s material misrepresentations.

Ignoring both the law and Plaintiffs' amended allegations, defendant wrongfully argues that the unjust enrichment claim should be dismissed because Plaintiffs do not adequately plead fraud in the procurement of a contract. Admittedly, Plaintiffs do not plead fraud. As clearly explained by this Court - a plaintiff need not allege procurement by fraud unless she repeats and realleges the contract allegations in the unjust enrichment claim, and even then, a plaintiff does not have to allege fraudulent procurement, but may plead that the contract is "unenforceable or ineffective for some other reason." Order, p. 5.

In the SAC, Plaintiffs do not repeat and reallege the contract allegations in the unjust enrichment claim. They are otherwise allowed to plead alternative claims for both breach of contract and unjust enrichment, Order, p.4. The allegations as to the unjust enrichment claim, which this Court has already deemed “sufficient to state a claim for unjust enrichment,” Order, p. 5, have not changed. Hence, defendant’s motion should be denied in its entirety and adjudication of the merits of all claims should proceed.

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PROCEDURAL HISTORY

The facts were fully set forth in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss the Unjust Enrichment Claim, in the First Amended Complaint. Briefly, this case concerns how Google, Inc. ("Google") bills advertisers who pay to have their websites listed as sponsored links on search results pages. While Google touts that it allows advertisers to set and control their own daily advertising costs and that advertisers only pay up to their daily budget on days they run their ad, in actuality, Google converts each advertiser's daily budget into a monthly budget (by multiplying it by 30 or 31) and charges up to said amount, irrespective of how many days the ad ran. For example, an advertiser who sets a daily budget of \$100 and runs her ad only 10 days in a 30 day month, has incurred authorized charges of only \$1000, but Google will charge any amount up to \$3000. Google will overdeliver the ad on the days it runs, but will not provide credit for overage as long as the total charge is within the "monthly" charge of \$3000 - even though the ad only ran 10 days. Plaintiffs allege that such conduct constitutes breach of contract, breach of the implied covenant of good faith and fair dealing, a violation of Cal. Bus. & Prof. Code § 17200 et seq., a violation of Cal. Bus. & Prof. Code § 17500 et seq., and unjust enrichment.

Plaintiffs filed their original complaint on August 3, 2005, in the Superior Court of the State of California, County of Santa Clara, alleging causes of action for violation of Cal. Bus. & Prof. Code§ 17200 et seq., breach of contract, negligent misrepresentation, unjust enrichment, imposition of a constructive trust, breach of the implied covenant of good faith and fair dealing, fraud - promise without intent to perform, and injunctive and/or declaratory relief. Service upon Defendant was effected on August 11, 2005. Defendant requested additional time to respond

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1 and, as per a Stipulation entered into between counsel for the parties on or about September 13,
2 2005, Plaintiffs granted Google its request for a 30 day extension, or until October 12, 2005. A
3 couple of days after the stipulation was signed, on or about September 16, 2005, Plaintiff
4 received Google's Notice of Removal of Action to Federal Court which, according to
5 Defendant's affidavit, had been served by mail on September 9, 2005.

6 On or about October 12, 2005, Google purportedly served its Motion to Dismiss
7 Plaintiffs' Complaint and supporting documents, via mail. On November 14, 2005, Plaintiffs
8 filed and served their First Amended Complaint ("FAC"). Google again requested additional
9 time to respond to the pleading and Plaintiffs again granted Google's request. On November 22,
10 2005, the parties stipulated that any answer to the FAC was to be filed and served by December 16,
11 2005, and that any responsive motion was to be filed and served by January 3, 2006. The parties
12 further agreed to meet and confer in December 2005 and to file their Joint Case Management
13 Statement on or before January 9, 2006, in accordance with the Court's Case Management Order
14 dated September 12, 2005. By December 22, 2005, Google stated that it would be filing a
15 motion to dismiss. The parties stipulated to adjourn the then January 9, 2006 Joint Case
16 Management Statement deadline to April 21, 2006, and the January 23, 2006 Case Management
17 Conference to May 1, 2006.

18 On January 3, 2006, Google filed its Motion to Dismiss Plaintiffs' Unjust Enrichment
19 Claim returnable March 6, 2006. (Had Plaintiffs been advised that defendant's motion would be
20 directed at only one claim, they would not have agreed to adjourn the CMC for more than three
21 months.) Plaintiffs submitted their Memorandum of Points and Authorities in Opposition to
22 Defendant's Motion to Dismiss Unjust Enrichment Claim on February 2, 2006.
23

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1 On January 31, 2006, the Court *sua sponte* adjourned the return date of defendant's
2 motion to March 13, 2006. Plaintiffs' counsel was unable to appear on that date and the next
3 date agreeable to both counsel and the Court was April 3, 2006. Thereafter, the parties
4 stipulated, and the Court ordered, that both the hearing on defendant's motion and the initial
5 Case Management Conference be held on April 3, 2006.

6 On or about March 9, 2006, the parties, unable to select an ADR process, submitted a
7 Notice of Need for ADR Phone Conference. Pursuant to a call held on March 29, 2006, the
8 parties decided that mediation would be the most advantageous process, when appropriate. The
9 parties submitted a list of five mediators on May 3, 2006.
10

11 On March 20, 2006, defendant filed their reply papers in further support of their motion
12 to dismiss the unjust enrichment claim.
13

14 On March 23, 2006, the parties submitted their Joint Case Management Statement and on
15 or about March 29, 2006, the parties exchanged their initial disclosures.
16

17 On or about March 30, 2006, the Court advised the parties that it would not have a
18 hearing on defendant's motion to dismiss, and subsequently advised counsel that the Initial Case
19 Management Conference scheduled for April 3, 2006 would be adjourned until June 26, 2006.
20

21 On April 12, 2006, the Court dismissed Plaintiffs' unjust enrichment claim as pled in the
22 FAC and granted Plaintiffs leave to replead by May 17, 2006 (which left time for Defendant to
23 answer the amended pleading prior to the initial conference).
24

25 Plaintiffs promptly filed their SAC on May 4, 2006.
26

27 On May 18, 2006, Defendant filed this motion to dismiss the unjust enrichment claim as
28 amended in the SAC.

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1 Thus, this case was filed nearly one year ago and Defendant has not yet filed a responsive
 2 pleading and the Initial Case Management Conference has not yet been held.
 3

4 **ARGUMENT**

5 **I. The Standards Of Proof On Defendant's Motion
 6 To Dismiss Plaintiffs' Unjust Enrichment Claim**

7 “The [Rule 12(b)(6)] motion to dismiss for failure to state a claim is viewed with
 8 disfavor and is rarely granted.”” Moulton v. AmeriCredit Financial Services, No. C 04-02485
 9 JW, 2005 U.S. Dist. LEXIS 32185, at *6 (N.D. Cal. June 28, 2005) quoting Gilligan v. Jamco
 10 Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997); Paulsen v. CNF, Inc., 391 F. Supp. 2d 804, 807
 11 (N.D. Cal. 2005). Such a motion must not be granted “unless it appears beyond doubt that the
 12 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.””
 13 Gilligan, 108 F.3d at 248 (citation omitted); Gorman v. Wolpoff & Abramson, LLP, 370 F.
 14 Supp. 2d 1005, 1008 (N.D. Cal. 2005). Dismissal pursuant to Fed. R. Civ. P.12(b)(6) is proper
 15 only when the plaintiff has failed to assert a cognizable legal theory or failed to allege sufficient
 16 facts under a cognizable legal theory. SmileCare Dental Group v. Delta Dental Plan of Cal.,
 17 Inc., 88 F.3d 780, 782-83 (9th Cir. 1996); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
 18 (9th Cir. 1988); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). A
 19 Court should not dismiss any claim for relief unless the plaintiff cannot prove any set of facts in
 20 support of the claim that would entitle her to relief. Steckman v. Hart Brewing, Inc., 143 F.3d
 21 1293, 1295 (9th Cir. 1998).

22 On a motion to dismiss a complaint for failure to state a claim, all allegations in the
 23 complaint are assumed to be true and the complaint is to be liberally construed in favor of the
 24 plaintiff. Paulsen, 391 F. Supp. 2d at 807; Star Patrol Enters. v. Saban Entertainment, No. 95-
 25

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1 56534, 1997 U.S. App. LEXIS 29994, at *2 (9th Cir. Oct. 23, 1997) (“Rule 12(b)(6) does not
 2 establish a high threshold for pleadings ‘allegations must be liberally construed and taken as
 3 true, and all inferences must be drawn in favor of the plaintiff.’”) (citation omitted); Williams v.
 4 Vidmar, 367 F. Supp. 2d 1265, 1269 (N.D. Cal. 2005) (“[t]he court ‘must presume all factual
 5 allegations of the complaint to be true and draw all reasonable inferences in favor of the
 6 nonmoving party.’”) (citation omitted). Pursuant to Fed. R. Civ. P. 12(b)(6), dismissal must be
 7 denied if, from the pleading’s four corners, factual allegations are discerned which taken
 8 together manifest any cause of action cognizable at law. Keiser v. Lake County Superior Court,
 9 No. C05-02310 MJJ, 2005 WL 3370006, at *8 (N.D. Cal. 2005).

12 **II. THE UNJUST ENRICHMENT CLAIM SET FORTH IN THE SAC STATES A**
 13 **VALID CLAIM AND FULLY COMPLIES WITH THE ORDER OF THIS COURT**

14 As clearly stated by the Court, “Plaintiffs’ unjust enrichment claim cannot include
 15 allegations that an express contract governs the parties’ rights, unless it also alleges that the
 16 express contract was procured by fraud or is otherwise unenforceable or ineffective.” Order, pp.
 17 4-5, and “Plaintiff’s allegations are otherwise sufficient to state a claim for unjust enrichment.”
 18 Order, pg. 5. Thus, the Court granted Plaintiffs leave to amend.

19
 20 **A. Plaintiffs’ Claim for Unjust Enrichment in the SAC Does Not Include**
 21 **Allegations That an Express Contract Governs the Parties’ Rights**

22 Count V of Plaintiff’s SAC, setting forth a claim for unjust enrichment, no longer repeats
 23 and realleges, nor otherwise includes, any express contract allegations. Thus, there is no longer
 24 any internal inconsistency preventing this otherwise valid claim from being sustained. Order,
 25 pp. 4-5; Lance Camper Manufacturing Corp. v. Republic Indemnity Co. of America, 44 Cal.
 26 App. 4th 194, 203, 51 Cal. Rptr. 2d 622, 628 (1996).

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 28
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1 In making its motion, Defendant either ignores the Order and Plaintiffs' amended
 2 pleading, or at best, misunderstands that as per both the Order and California law, an unjust
 3 enrichment claim can stand without any allegation as to the unenforceability of the contract,
 4 provided said claim does not reallege an express contract between the parties - which Count V
 5 does not.¹ Given Plaintiffs' correction of their prior pleading error, their unjust enrichment claim
 6 in the SAC is valid and sustainable. "Pursuant to Federal Rule of Civil Procedure 8(e)(2),
 7 Plaintiffs are entitled to plead the alternative claims of breach of contract and unjust enrichment,
 8 despite the inconsistency between those claims." Order, p. 4 (citations omitted). Again, the
 9 allegations as to the elements of unjust enrichment, namely, receipt of a benefit and unjust
 10 retention of the benefit at the expense of another, have already been deemed "sufficient," Order,
 11 p. 5, and they have not changed.

12 **B. Plaintiffs Alternatively Allege That If The Parties Are Found to Have
 13 Entered Into An Express Contract Said Contract is Unenforceable**

14 Even though Plaintiffs' removal of the contract allegations in its claim for unjust
 15 enrichment, by itself, requires that their unjust enrichment claim be upheld, Plaintiffs
 16 alternatively allege:

17 123. Alternatively, if and to the extent, the parties are found to have entered into an
 18 express contract governing the claims herein, plaintiffs are still entitled to restitution
 19 benefits. Such contract is voidable and otherwise unenforceable given Google's material
 20 misrepresentations that advertisers may pause their ad without being charged for those
 21 days, and that advertisers would not be billed more than their daily budget for those days

22
 23
 24 ¹Plaintiffs have realleged paragraph 19 in Count V of the SAC because it defines
 25 "Agreement" the document through which defendant disseminated, most, but not all, of its
 26 material misrepresentations. The paragraph does not allege that the document constitutes a valid
 27 contract.

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1 that their ad runs. The material misrepresentations were, and are, contrary to Google's
2 billing practices.

3 This allegation preserves the unjust enrichment claim if the fact-finder finds an express
4 contract between the parties governing the within dispute.² It also eliminates any possible
5 inconsistency within the unjust enrichment claim by explicitly alleging that any contract is
6 unenforceable by reason of Google's material misrepresentations. See Order, p. 5 (An unjust
7 enrichment claim can be pled even if it incorporates allegations as to an express contract
8 provided it is also alleged that said contract was procured by fraud or is otherwise enforceable or
9 ineffective). As repeated above, Plaintiffs have pled that the contract is unenforceable or
10 voidable by virtue of defendant's material misrepresentations. By definition, a material
11 misrepresentation is a misrepresentation that is "likely to induce a reasonable person to manifest
12 his assent", or is a misrepresentation that "the maker knows [] would be likely to induce the
13 recipient to do so." Restatement (Second) Contracts § 162 (1981) (When a Misrepresentation is
14 Fraudulent or Material). Restatement of the Law, Second. Indeed, judges have found that it is
15 "'frequently said, by judges and law writers, [] that every part of a consideration is to be
16 presumed to have had some effect, in inducing the party recipient of the consideration, to enter
17 into the contract.'" Hanley v. Savannah Bank & Trust Co., 68 S.E.2d 581, 582-83 (Ga.1952)
18 (citation omitted). This certainly holds true here, where Google's alleged material
19 misrepresentations concern the essence of the contract, namely, the costs to be borne by the
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26 ²Plaintiffs recognize that they are not entitled to double recovery under both claims.
27

1 advertisers, and the allegations are to be liberally construed in favor of Plaintiffs and all
 2 inferences are to be drawn in Plaintiffs' favor.
 3

4 For the reasons set forth above, Defendant's argument that the unjust enrichment claim in
 5 the SAC should be dismissed is meritless. Defendant attempts to require and/or create a fraud
 6 claim - “[t]hese purported ‘material misrepresentations’ are allegations of actual fraud,”
 7 Defendant Google, Inc.’s. Memorandum of Points and Authorities (“Def.’s Mem.”), p. 3 - just to
 8 have something to knock down and move against.³ As previously stated, Plaintiffs have not, and
 9 need not, allege fraud.
 10

11 Plaintiffs followed this Court’s guidance and in so doing, have now properly pled
 12 alternative claims for breach of contract and unjust enrichment.
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24 ³*See also* Def.’s Mem., p. 3 citing and paraphrasing *Wilkie v. Coinway, Inc.*, 257 Cal.
 25 App.2d 126, 136, 64 Cal. Rptr. 845, 852 (1967) which concerned fraudulent, as opposed to
 26 material, misrepresentations and which did not even discuss pleading standards. Interestingly,
 27 the *Wilkie* Court stated, “[O]ne material false statement is sufficient ground for rescission.” 257
 28 Cal. App.2d at 138, 64 Cal. Rptr. at 852.

CONCLUSION

For the reasons set forth herein and the allegations in Plaintiffs' Second Amended Complaint, Defendant Google Inc.'s Motion to Dismiss Plaintiffs' Unjust Enrichment Claim in the Second Amended Complaint should be denied in its entirety and this case should proceed to an adjudication on the merits of all claims.

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